RE HJ AHMAD LAZIM & ANOR, EX P BANK KERJASAMA RAKYAT (M) BHD

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[BANKRUPTCY CASE NO: 29-350-98]
11 FEBRUARY 1999

BANKRUPTCY: *Notice - Irregular notice - Notice founded upon judgment obtained more than six years ago - No leave to execute judgment obtained - Whether notice irregular and ought to be set aside - Whether leave to execute judgment must be obtained before notice could be issued - Whether judgment creditor was in a position to issue execution on judgment when notice was issued - Whether issuance of a bankruptcy notice is execution to enforce judgment - Bankruptcy Act 1967, s. 3(1)(i)*

BANKRUPTCY: *Notice - Duplicity - Issuance of second notice while first notice still effective - Whether second notice bad for duplicity - When will second notice be bad for duplicity if issued during validity of another*

BANKRUPTCY: *Notice - Setting aside - Accord and satisfaction of judgment debt - Arrangement for rental from premises owned by judgment debtor to be paid to judgment creditor - Judgment debtor reserved right to terminate rental arrangement - Whether accord reached between judgment debtor and judgment creditor for judgment debt to be paid by monthly instalments*

BANKRUPTCY: *Notice - Setting aside - Accord and satisfaction of judgment debt - Tenancy agreement between third party landowner and judgment creditor - Clause providing arrangement for rental to be deducted to settle debt owed by judgment debtor to judgment creditor - Third party reserved right to revoke arrangement - Whether clause amounted to agreement between judgment debtor and judgment creditor - Whether accord reached between judgment debtor and judgment creditor for judgment debt to be paid by monthly instalments - Whether clause amounted to outside agreement preventing judgment creditor from demanding judgment debt*

In 1987, the respondent obtained judgment against the appellants for a certain sum of money. Sometime in 1998, the respondent served a bankruptcy notice ('the present notice') on the appellants founded on the judgment it obtained in 1987. The respondent had earlier issued and thereafter served on the appellants a bankruptcy notice in 1997 ('the first notice') also founded on the judgment it obtained in 1987. The first notice was, however, set aside without objection from the respondent. Similarly, the appellants applied to set aside the present notice but the application was disallowed and hence this appeal.

The appellants argued that the present notice should be set aside because, firstly, it was bad for duplicity. This contention hinged upon the fact that when the present notice was issued, the first notice was not yet set aside. Thus, the appellants contended that the issuance of the first notice precluded the issuance of the present notice as the first was still effective.

The second ground of appeal was that the present notice ought to be set aside as there had been accord and satisfaction in respect of the judgment debt. This ground of appeal was based on the following facts. A particular branch of the respondent rented premises belonging to the second appellant. There was a letter from the appellants to this branch of the respondent wherein it was stated that pursuant to an arrangement between the appellants and the respondent, the rental for occupying the premises was to be paid to the respondent. The letter also included a condition that this arrangement was to subsist at the behest of the appellants. The appellants argued that accord could be initially inferred from this letter combined with the respondent's conduct of accepting the rentals and their non-execution of the judgment obtained in 1987.

Later, the premises were sold to a company but the said branch of the respondent continued to rent the same. A tenancy agreement was entered into between the respondent and the new proprietor wherein there was a clause to the effect that a certain portion of the rental was to be deducted for the purpose of settling a debt owed by the appellants to the respondent. It was also stated in the said clause that this arrangement was subject to revocation by the new proprietor. The appellants argued that this clause coupled with the unequivocal acceptance of the portion of the rental by the respondent for the credit of the appellants, evidenced subsequent accord.

In the alternative, the appellants argued that the above mentioned clause in the tenancy agreement constituted an outside agreement entered into between the new proprietor and the respondent to the effect that the new proprietor would settle the whole judgment debt by instalments and that since that collateral agreement controlled the judgment entered against the appellants, the respondent could not now demand that the appellants pay the judgment debt as required by the bankruptcy notice.

During the course of the trial, the court on its own accord realised that the judgment upon which the present bankruptcy notice was founded had been obtained more than six years ago. It was further revealed that no leave to execute the judgment had been obtained. Consequently, the appellants raised a further ground of appeal contending that since no leave to execute the judgment had been obtained when the present bankruptcy notice was issued,

the present notice must be set aside. The respondent, meanwhile, submitted that the appellants should be estopped from taking this objection as it was not raised in their affidavit.

Held:

[1] A bankruptcy notice must be served within three months from issue thereof. If not so served within that time frame, a second bankruptcy notice may be issued on the same judgment.

[1a] A second bankruptcy notice issued whilst the first notice is still valid or effective is not bad for duplicity unless it can be shown that the issuance of more than one notice during the validity of the other is an abuse of process or amounts to oppressive conduct.

[1b] The appellants did not complain that the present bankruptcy notice was being used oppressively against them or that it was used to embarrass them and neither was there evidence to suggest this. In fact, the respondent had not acted any further on the first bankruptcy notice and agreed to it being set aside. Thus, the issuance of the present bankruptcy notice whilst the first bankruptcy notice was still effective did not make it bad for duplicity.

[2] The letter did not refer to the judgment debt or to the judgment obtained against the appellants. Neither did it in any way state that the appellants were offering to pay the whole judgment debt by monthly instalments until fully settled and that the rentals were to be treated as payment of those monthly instalments. Thus, it could not be inferred that an accord had been reached between the appellants and respondent that the whole judgment debt be paid by monthly instalments.

[2a] The condition in the letter militated against the inference of an accord as suggested by the appellants. By reserving a right to terminate the rental arrangement, the more reasonable inference was that the rental arrangement was a temporary measure which was not to bind the appellants to the arrangement made.

[3] The appellants were not a party to the tenancy agreement and the clause therein made no mention of the judgment debt. Therefore, the said clause did not constitute an agreement between the appellants and the respondent to pay the whole judgment debt by monthly instalments.

[3a] The arrangement in the said clause being subject to revocation made it uncertain if the rental arrangement would continue until the whole judgment debt was fully settled. In any event, the judgment debt would not be fully paid even within the maximum tenancy period. Further,

a there were other clauses in the tenancy agreement whereby the tenancy agreement might be terminated earlier by six months' notice. Such terms went against the inference that there was an accord that the whole judgment debt was to be fully settled by instalments by way of rentals. Thus, the said clause in the tenancy agreement did not evidence an b accord as alleged.

[4] The clause in the tenancy agreement made no mention at all about the judgment entered against the appellants and that the deductions from the rentals were to satisfy that judgment. There was also nothing therein to suggest that an agreement had been reached between the new proprietor c and the respondent that the new proprietor would be responsible to settle the whole judgment debt in place of the appellants. Therefore, the said clause could not constitute an outside agreement.

[5] It was the court that invited submissions on the point of whether leave d to execute the judgment was necessary. In doing so, no procedural unfairness had resulted to the respondent as they were given time to research and submit on the matter. Therefore, the appellants were not prevented from taking this point.

[6] The issuance of a bankruptcy notice is not execution to enforce a e judgment. However, if more than six years have elapsed since a judgment is obtained, and leave has not been obtained to execute that judgment, the judgment creditor cannot be described as being in a position to issue execution on that judgment. If execution can be issued only with leave of the court, such leave must be obtained before a f bankruptcy notice can be issued thereon.

[6a] The reason leave is required in such a situation is because the words "and execution thereon not having been stayed" appearing in s. 3(1)(i) of the Bankruptcy Act 1967 mean that a judgment creditor must not merely have obtained a final judgment but must be in a position to issue g execution upon it.

[7] The respondent did not show that it was in a position to issue execution on the judgment when the present bankruptcy notice was issued. Such notice was therefore irregularly issued.

h **[7a]** The irregularity had resulted in the present bankruptcy notice being issued and served on the appellants when it should not have been issued in the first place. The legal consequence of such service on the appellants was that if they did not within seven days respond in the manner indicated in the bankruptcy notice, they would have committed i an act of bankruptcy. That act of bankruptcy became available not only

to the respondent but to any other creditor of the appellants to present a bankruptcy petition on. Thus, the appellants had suffered substantial injustice which could only be remedied by an order invalidating the bankruptcy notice by setting it aside.

[Appeal allowed.]

Cases referred to:
Chinn Swee Onn v. Puchong Realty Sdn Bhd [1990] 1 CLJ 28 ***(cit)***
Datuk Mohd Sari Datuk Hj Nuar v. Norwich Winterthur Insurance (M) Sdn Bhd [1992] 4 CLJ 1798 ***(dist)***
Hj Nik Ishak Hj Nik Daud v. Nik Zainab Nik Jaafar [1975] 2 MLJ 82 ***(cit)***
Kerpa Singh v. Bariam Singh [1966] 1 MLJ 38 ***(cit)***
Re A Bankruptcy Notice [1898] 1 QBD 387 ***(cit)***
Re Fredericke & Withworth, ex p Hibbard [1927] 1 Ch 253 ***(foll)***
Re Ide, ex p Ide [1886] 17 QBD 755 ***(aff)***
Re Lim Ah Hee, ex p Perwira Affin Bank Bhd [1997] 4 CLJ 462 ***(not foll)***
Re Mohd Fadzimi Yaakub, ex p United Malayan Banking Corporation Bhd [1998] 1 CLJ 783 ***(dist)***
Re Woodall, ex p Woodall [1884] 13 QBD 479 ***(aff)***
Wee Chow Yong v. Public Finance Bhd [1990] 1 CLJ 176 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Bankruptcy Rules 1969, r. 96
Contracts Act 1950, ss. 42, 64
Rules of the High Court 1980, O. 46 r. 2(1)

Bankruptcy Act 1883 [UK], s. 4(1)(g)
Rules of the Supreme Court 1883 [UK], r. 23

For the judgment debtor - Lee Pui Man; M/s Khong & Son
For the judgment creditor - A Mariadass; M/s Mariadass Lock & Ainuddin
Shivdev Singh (LH Singh with him); M/s LH Singh & Co

Reported by S Dharmendran

JUDGMENT

Clement Skinner JC:

This appeal is brought by the 1st and 2nd judgment debtor (hereafter the 1st and 2nd appellants) against the decision of the deputy registrar who on 2 October 1998 dismissed their application to set aside a bankruptcy notice dated 5 May 1998 (hereafter the present bankruptcy notice) served on the 1st appellant on 8 June 1998 and on the 2nd appellant on 12 June 1998.

The facts leading up to this appeal are these.

The 1st and 2nd appellants are proprietors of a firm trading as Syarikat Alfa. On 8 July 1987 the judgment creditor (hereafter the respondents) obtained judgment in Suit 23-508-86 against the 1st and 2nd appellants trading as Syarikat Alfa, in the sum of RM2,005,361.28 together with interest thereon at 16% per annum from 31 October 1986 till date of judgment and thereafter at 8% per annum till date of payment.

In 1987 when judgment was entered, the 2nd appellant was the registered owner of premise known as No. 45, Kompleks PKNPK Medan Gopeng, Ipoh, (hereafter the said premise). The respondents were occupying the ground floor of the said premise as tenant. From 1 February 1993, an arrangement was entered into (hereafter the rental arrangement) whereby the respondents instead of paying the rentals of RM1,500 to the 2nd appellant paid the amount into an account in the name of Syarikat Alfa maintained with the respondents so that the rentals could be utilised to pay the debt of Syarikat Alfa.

In 1997, the 2nd appellant sold the said premise to a company known as Maju Alfa (M) Sdn. Bhd. (hereafter the Sdn. Bhd.) whereafter on 3 June 1997 a tenancy agreement (hereafter the said tenancy agreement) was entered into between the respondents and the Sdn. Bhd. wherein the rental arrangement was preserved. The monthly rental payable for the said premises was RM2,200. By cl. 6(1) of the tenancy agreement, the Sdn. Bhd. permitted the respondents to deduct from the rentals a sum of RM1,800 which was to be treated as payment by Syarikat Alfa to the respondents. This arrangement was to go on until the debt of Syarikat Alfa was settled or until further notice from the Sdn. Bhd.

The above arrangement went on till April 1998 when the respondents refused to deduct the sum of RM1,800 from the rentals towards settlement of Syarikat Alfa's debt and instead paid the whole rental of RM2,200 direct to the Sdn. Bhd. The respondents ceased deducting the sum of RM1,800 from the rentals because on 5 May 1998, they had issued the bankruptcy notice now complained of.

To complete the picture, certain other background facts must be alluded to. On 22 December 1997, the respondents had issued and thereafter served on the 1st and 2nd appellants a bankruptcy notice numbered 29-913-97 (hereafter the 1st bankruptcy notice) founded on the judgment dated 8 July 1987. The 1st bankruptcy notice was served on different dates on each of the appellants. I am unable to ascertain from the documents the date of service but on 14 February 1998 the 1st appellant filed an application to set the same aside. The 2nd appellant on 21 February 1998 filed her application to do the same. The respondents then on 5 May 1998 issued the present bankruptcy notice and

served the same on the 1st appellant on 8 June 1998 and on the 2nd appellant on 12 June 1998. On being so served, the 1st and 2nd appellants on 15 June 1998 applied to set the same aside. On 9 July 1998 the application to set aside the 1st bankruptcy notice was heard. It was set aside with costs with no objection thereto from the respondents. The appellants' application to set aside the present bankruptcy notice came up for hearing on 2 October 1998 when it was disallowed, hence this appeal.

The appellants say the present bankruptcy notice should be set aside on several grounds: (a) it is bad for duplicity and (b) there has been an accord and satisfaction in respect of the judgment debt. For the record, the appellants abandoned another complaint regarding non payment of their costs.

During arguments, it was apparent to me that the judgment upon which the present bankruptcy notice was founded had been obtained more than six years ago. In reply to a question from me, counsel for the respondents stated that when the present bankruptcy notice was issued and served, leave to execute the judgment had not been obtained even though leave had apparently been obtained previously but had since lapsed as more than a year had passed since leave was obtained. I therefore invited arguments from counsel on whether a bankruptcy notice could be issued based on a judgment where more than six years had elapsed since the date of that judgment and no leave to execute the same had been obtained. The appellants have accordingly raised as a third ground the objection that as no leave to execute the judgment had been obtained when the present bankruptcy notice was issued, it must be set aside.

I shall now deal with each of these grounds.

Duplicity Of Bankruptcy Notice

It is the submission of the appellants that the issuance of more than one bankruptcy notice in respect of the same judgment debt renders the second bad for duplicity. As the 1st bankruptcy notice had not been set aside yet when the present bankruptcy notice was issued on 5 May 1998, the issuance of the 1st bankruptcy notice precludes the issuance of a subsequent bankruptcy notice when the first was still effective.

I have looked at the provisions of the Bankruptcy Act 1967 and the Bankruptcy Rules 1979 to see if anything may be found in them to lend support for the appellants' complaint but cannot find any. A bankruptcy notice must be served within three months from issue thereof (see r. 96 Bankruptcy Rules 1969). If not so served within that time frame, a second bankruptcy notice may be issued on the same judgment. If that be the case, will a second bankruptcy notice issued whilst the first notice is still valid or effective render the second notice bad for duplicity? There is case law to the effect that it is not unless

it can be shown that the issuance of more than one notice during the validity of the other is an abuse of process or amounts to oppressive conduct. Learned counsel for the respondents has referred to the case of *In re Fredericke and Withworth Ex parte Hibbard* [1927] 1 Ch. 253. In that case, the judgment creditor issued three bankruptcy notices against the judgment debtors founded on the same judgment debt. The first bankruptcy notice was ordered to be withdrawn due to an informality. A second bankruptcy notice was issued and served on the judgment debtors. It was not complied with and so an act of bankruptcy became available. Whilst this act of bankruptcy was still available to found a bankruptcy petition, the judgment creditor issued a third bankruptcy notice against the judgment debtors which was not complied with. A bankruptcy petition was then presented based on the act of bankruptcy available on the third notice. The judgment debtors applied to set aside a receiving order made against them on the grounds that they were excused from complying with the third bankruptcy notice by virtue of the service of the second bankruptcy notice on them. The registrar refused to set aside the order. On appeal, the Court of Appeal dismissed the same and in doing so, Sargent LJ said at p. 261:

> If, while an earlier bankruptcy notice were still available for a petition a second notice were given in bad faith or to embarrass the debtor, the Court could prevent oppression by declining to act. But in my view there has been nothing of this sort here. The first bankruptcy notice had been withdrawn, objection had been taken to the section notice which had not been conclusively satisfied, and I think that the third notice was served to escape from those objections, and to place the petitioning creditors in a stronger and less challengable position than they had previously occupied.

In applying to set aside the present bankruptcy notice, the appellants do not complain that the present bankruptcy notice is being used oppressively against them or that it was issued to embarrass them and neither is there any evidence to suggest this. In fact, the respondents have not acted any further on the 1st bankruptcy notice and agreed to it being set aside on 9 July 1998. In the circumstances I hold that the issue of the present bankruptcy notice whilst the 1st bankruptcy notice was still effective does not make it bad for duplicity.

Accord And Satisfaction

Simply put, it is the appellants' case that an accord had been reached with the respondents that the judgment debt of RM2.05 million was to be paid by instalments until fully settled. The appellants say that initially the installments were to be paid by Hajjah Faridah, the 2nd appellant, and subsequently by the Sdn. Bhd. The respondents deny any such accord.

The question for determination is whether there was such an accord as alleged. The appellants say the accord is initially to be inferred from a letter dated 1 February 1993 from Syarikat Alfa to the respondents together with the conduct of the respondents in accepting the instalments without reservation and thereafter witholding execution on the judgment for three or four years. Subsequently, when the Sdn. Bhd. became the owner of the said premise, the accord is evidenced by cl. 6(i) of the said tenancy agreement and the unequivocal acceptance of the instalments from the Sdn. Bhd. for the credit of Syarikat Alfa. The letter of 1 February 1993 setting out the rental arrangement is in these terms:

Rujukan Kami: SA/BR-4011/93 Tarikh: 1/2/1993

Bank Rakyat
No. 45, Kompleks PKNP
Medan Gopeng Satu
Jalan Gopeng
31350 Ipoh.

U/P: En. Ahmad Kidzbullah Hj. Ridzuan Pengurus.

Tuan,

BAYARAN SEWA PEJABAT DI NO. 45, KOMPLEKS PKNP MEDAN GOPENG 1, JALAN GOPENG, 31350 IPOH SEBANYAK RM1500.00

Adalah dengan hormatnya berhubung perkara di atas.

Kami telahpun membuat satu persetujuan khas dengan pihak Bank Rakyat pusat di Kuala Lumpur bagi pihak tuan membuat pembayaran terus sewa pejabat dari Syarikat Alfa berjumlah RM1500.00 kepada Bank Rakyat pusat yang beralamat di Suite 3.4, Tingkat 3, Bangunan Angkasa Raya, Jalan Ampang, Kuala Lumpur, untuk perhatian En. Ramman bin Masdr bermula dari bulan Mac, 1993.

Tuan boleh meneruskan pembayaran ini sehingga mendapat arahan daripada kami samada untuk memberhentikannya ataupun meneruskannya. Pembayarannya ini adalah dikira dari sewa bulan Mac, 1993.

Sekian. Kerjasama pihak tuan amatlah dihargai dan terlebih dahulu diucapkan ribuan terima kasih.

Yang benar,

SYARIKAT ALFA

T.t.
HAJI AHMAD BIN LAZIM
Pengurus

It should be noted that this letter does not refer to the judgment debt or to the judgment obtained against the appellants as proprietors of Syarikat Alfa. The letter also did not in any way state that the appellants were offering to pay the whole judgment debt by monthly instalments of RM1,500 until fully settled and that the rentals were to be treated as payment of those monthly instalments.

That being the case, I do not see on what basis it is submitted by the appellants that it is to be inferred from the letter of 1 February 1993 that an "accord" had been reached between the appellants and respondents that the whole judgment debt be paid by monthly instalments. In fact, there is a condition stated in the said letter that militates against the inference suggested by the appellants. The appellants had in that letter expressly reserved to themselves the right to terminate the rental arrangement. With such a condition, the more reasonable inference is that the rental arrangement was a temporary measure which was not to bind the appellants to the arrangement made. In the circumstances I cannot accept the appellants' submission that an accord had been reached in 1993.

It was then said that after the 2nd appellant transferred the said premise to the Sdn. Bhd., the "accord" is evidenced in cl. 6(i) of the tenancy agreement which reads:

> 6(i): Pemilik Bangunan memberi kebenaran kepada penyewa untuk membuat potongan wang berjumlah Ringgit Malaysia Satu Ribu Lapan Ratus (RM1,800.00) sahaja daripada sebahagian bayaran sewa berkenaan pada tiap-tiap bulan bagi tujuan menjelaskan hutang Syarikat Alfa (BR No. 354879) kepada penyewa mengikut Akaun No. Ruj: 9030/1269/88/tp-5 yang disimpan diantara Syarikat Alfa dan penyewa sehingga selesai hutang berkenaan ataupun sehingga menerima arahan selanjutnya secara resmi daripada Pemilik Bangunan untuk memberhentikan potong bayaran sewa berkenaan sepertimana yang telah dipersetujui oleh kedua-dua pihak menurut surat arahan daripada Pemilik Bangunan kepada Penyewa bertarikh 1 Februari 1993 yang dilampirkan bersama ini sebagai 'Lampiran A'. Walau bagaimanapun wang lebihan bayaran sewa tersebut setelah dibuat potongan tersebut akan dijelaskan oleh Penyewa terus kepada Pemilik Bangunan pada setiap bulan atau pun pada arahan lain yang diberikan dan dipersetujui kemudian di antara kedua-dua pihak.

There are several things to note about cl. 6(i). Firstly, the appellants are not a party to the tenancy agreement and the clause makes no mention of the judgment debt. I do not therefore see on what basis the appellants say that cl. 6(i) constitutes an agreement between the appellants and the respondents to pay the whole judgment debt by monthly instalments. Secondly, the words "sehingga selesai hutang berkenaan ataupun sehingga menerima arahan

selanjutnya secara resmi daripada Pemilik Bangunan" indicates that the permission to set off or deduct rentals may be revoked at any time by the Sdn. Bhd. If that be the case, there is no certainty that the rental arrangement evidenced in cl. 6(i) will continue until the whole judgment debt is fully settled. Thirdly, the tenancy agreement itself is for a period of three years with a right of extension for two further periods of three years each. Thus, even if all extensions were granted, the tenancy agreement lasts a maximum of nine years only. The judgment debt would therefore never be fully paid within the tenancy period. This fact weighs against any inference that there was an accord to settle the whole judgment debt by monthly instalments of RM1,800. Fourthly, the tenancy agreement contains other clauses, such as cls. 6(h) and 7(e) whereby the tenancy agreement could be earlier terminated by six months notice. Such terms in the tenancy agreement again go against any inference that there was an accord that the whole judgment debt was to be fully settled by instalments by way of the rentals. For the reasons stated above, I find cl. 6(i) of the tenancy agrement did not evidence an accord as alleged.

It is next said by the appellants in the alternative that at the time of the issue of the present bankruptcy notice, there was in existence a collateral agreement between the Sdn. Bhd. and the respondents. This collateral agreement is to be found in cl. 6(i) of the tenancy agreement and counsel for the appellants refers to the case of *Datuk Mohd. Sari bin Datuk Hj. Nuar v. Norwich Winterthur Insurance (M) Sdn. Bhd.* [1992] 4 CLJ 1798; [1992] 2 MLJ 344 where the notes read:

> Held (2): The terms of the consent judgment were controlled by an outside agreement between the judgment debtor and creditor through their solicitors, and non-compliance with the judgment is not an act of bankruptcy so long as the terms of the judgment are controlled by that outside agreement.

Learned Counsel for the appellants did not elaborate what the collateral agreement to be found in cl. 6(i) is, but by reference to the *Datuk Mohd. Sari* case *(supra)*, I take it that counsel submits that cl. 6(i) of the tenancy agreement constitutes an outside agreement entered into between the Sdn. Bhd. and the respondents to the effect that the Sdn. Bhd. would settle the whole judgment debt by instalments and that since that collateral agreement now controls the judgment entered against the appellants, the respondents cannot now demand that the appellants pay the judgment debt as required by the bankruptcy notice.

I am afraid I do not find merit in this submission. Clause 6(i) makes no mention at all about the judgment entered against the appellants and that the deductions from the rentals are to satisfy that judgment. More importantly, I cannot find any words in the clause to suggest that an agreement had been reached between the Sdn. Bhd. and the respondents that the Sdn. Bhd. would be responsible to settle the whole judgment debt in place of the appellants.

It was finally argued by the appellants that on the facts of this case, s. 42 and s. 64 of the Contracts Act 1950 would come to their aid to relieve them of their liability.

It is said that s. 42 applied as the respondents had accepted performance of the obligation to pay the whole judgment debt by the Sdn. Bhd. I regret I do not accept this submission. I have earlier in this judgment discussed cl. 6(i) of the tenancy agreement in the context of both an "accord" as well as a collateral agreement. It follows from what I have already said on each of those submissions that I now hold the respondents had not accepted performance by the Sdn. Bhd. nor had the Sdn. Bhd. agreed to so pay the whole judgment debt.

The appellants have referred to the cases of *Kerpa Singh v. Bariam Singh* [1966] 1 MLJ 38; *Haji Nik Ishak bin Haji Nik Daud v. Nik Zainab binti Nik Jaafar* [1975] 2 MLJ 82 and *Chinn Swee Onn v. Puchong Realty Sdn. Bhd.* [1990] 1 CLJ 28; [1990] 1 MLJ 108 in support of their arguments under s. 42 Contracts Act. I find that these authorities do not advance the case for the appellants as firstly their facts are not on all fours with the facts of our case and secondly, in each of the cited cases, the court found that either the judgment creditor had agreed to accept performance from a third party or that the judgment creditor had agreed to discharge the original judgment debtor from further liability. I have not found any of these elements in our case.

As regards s. 64, it is said that by accepting instalment payments the respondents had agreed to 'extend the time for performance' to pay the judgment debt. I must again say I cannot accept this argument. I have already in discussing the rental arrangement in 1993 and later in 1997 found that there was no agreement whether between the appellants or the Sdn. Bhd and the respondents for payment of the whole judgment debt by instalments.

Was Leave To Execute The Judgment Necessary

The respondents say the appellants should be estopped from taking this objection as it was not raised in their affidavit. I wish to point out that it was the court that invited submissions on this point. In doing so no procedural unfairness has resulted to the respondents as they were given time to research and submit on the matter. I therefore hold that the appellants are not prevented from taking this point.

Section 3(1)(i) of the Bankruptcy Act 1967 omitting immaterial portions, read as follows:

A debtor commits an act of bankruptcy ...

(i) if a creditor has obtained a final judgment against him for an amount and execution thereon not having been stayed has served on him ... a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or notice ... and he does not within seven days after service of the notice ... comply with the requirements of the notice ... Provided that for the purposes of this paragraph ... any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order ...

Order 46 r. 2(1) Rules of the High Court (RHC) reads:

(1) A writ of execution to enforce a judgment or order may not issue without the leave of court in the following cases, that is to say:

(i) Where six years or more have lapsed since the date of judgment or order; ...

The objection taken in this appeal was also raised in the case of *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd.* [1990] 1 CLJ 176; [1989] 3 MLJ 508. In that case Edgar Joseph Jr. J (as his lordship then was) undertook a proper interpretation of s. 3(1)(i) of the Bankruptcy Act 1967 and in doing so examined the position in the U.K. where, as pointed out by his lordship, the provisions of s. 4(1)(g) of the Bankruptcy Act 1883 is generally in *pari materia* with s. 3(1)(i) of our Bankruptcy Act. Having considered the cases of *Re Ide, ex p Ide* [1886] 17 QBD 755 and *Re Woodall, ex parte Woodall* [1884] 13 QBD 479 both of which cases he found to be of direct relevance when construing s. 3(1)(i) of our Act and therefore to follow, his lordship stated at p. 510:

To my mind, it is not an unfair summary of the position in UK to say that a creditor can issue a bankruptcy notice only when he has obtained a final judgment or a final order. The judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with leave of the court, the creditor must obtain such leave before he can issue a bankruptcy notice.

Learned counsel for the respondents urges me not to follow the decision in *Wee Chow Yong (supra).* Counsel submits that as bankruptcy proceedings do not constitute execution proceedings within the meaning of O. 46 RHC, the failure to obtain leave to execute the judgment in this case cannot amount to an impediment which comes within the meaning of the words "and has not been stayed" found in s. 3(1)(i) of our Bankruptcy Act. The cases of *Re Lim Ah Hee Ex Parte Perwira Affin Bank Bhd.* [1997] 4 CLJ 462 and *Re A*

Bankruptcy Notice [1898] 1 QBD 387 are relied upon in support of the above submission. Counsel further submits that what Edgar Joseph Jr. J said in *Wee Chow Yong* regarding the requirement of a judgment creditor to show that he is in a position to enforce his judgment is to be regarded as *'obiter'* only since the learned judge finally decided that no leave was in fact required in that case. Finally, counsel submitted that the learned judge was referring to the practice in the UK where though bankruptcy proceedings are not regarded as a form of execution, yet as a matter of practice, a master's fiat is still required before a bankruptcy notice is issued. Since there is no such practice requirement in Malaysia and as authorities show that O. 46 RHC has no relevance to bankruptcy proceedings, there is no requirement for the respondents to obtain leave to execute their judgment before issuing the present bankruptcy proceedings.

I regret I cannot accept these submissions. That the issue of a bankruptcy notice is not execution to enforce a judgment is not in dispute. This is made very clear in *Wee Chow Yong (supra)* where the learned judge went out of his way to point this out when he said: "I would make the preliminary observation that the issue of a bankruptcy notice is not execution to enforce a judgment (see eg, *Re A Bankruptcy Notice* per Chitty LJ at p. 386)." However, the decision in *Wee Chow Yong* makes it clear that if more than six years have elapsed since a judgment is obtained, and leave has not been obtained to execute that judgment, the judgment creditor cannot be described as being in a position to issue execution on that judgment. If execution can be issued only with leave of the court, such leave must be obtained before a bankruptcy notice can be issued thereon.

I should point out that the reason such leave is required is because of the words "and execution thereon not having been stayed". These words which appear in s. 4(1)(g) of the UK Bankruptcy Act 1883 and also in s. 3(1)(i) of our Bankruptcy Act 1967, have been interpreted in the case of *Re Woodall* (per Lindley LJ) and in *Re Ide* (per Bowen LJ) to mean that a judgment creditor must not merely have obtained a final judgment but must be in a position to issue execution upon it.

With reference to the case of *Re Lim Ah Hee (supra),* I note that although it was a decision delivered in 1997, the case of *Wee Chow Yong* was not referred to or considered. It should also be noted that the specific question of whether the judgment creditor needed to obtain leave to execute the judgment before issuing a bankruptcy notice was withdrawn from consideration as the judgment debtor was satisfied leave had been obtained. In the circumstances, I respectfully decline to follow it.

I do not regard what the learned judge said in the *Wee Chow Yong* case regarding the requirement for leave to issue execution on a judgment as mere *'obiter dicta'* as alleged. The reverse is the position. Notwithstanding that the learned judge found on the evidence before him that as six years had not elapsed between the judgment date and the date the bankruptcy notice was served no leave to execute the judgment was necessary, this does not render all what he said regarding the requirement for such leave *'obiter'* because to arrive at such decision, he had to first decide whether or not leave was required. What the learned judge said was therefore part of the reasons for his decision.

As regards the submission that leave under O. 46 r. 2(1) RHC is not required because such leave in UK refers to a master's fiat which is a thing unknown and not required in Malaysia, I cannot agree with this argument. Whilst as a matter of practice in UK a master's fiat is required, a reading of the case of *Re Ide* and *Re Woodhall* will show that the learned appeal judges were referring to the leave expressly required under r. 10 and r. 23 of Order XLII respectively of the English Rules of the Supreme Court 1883 to enforce a judgment in the situations therein stated. In Malaysia, the leave provisions are found in our O. 46. The fact that we do not require a master's fiat to issue a bankruptcy notice does not mean that a judgment creditor need not comply with a substantive provision of the Bankruptcy Act namely s. 3(1)(i) to show that he is in a position to issue execution on his judgment when the bankruptcy notice is issued.

It is therefore my respectful view that the case of *Wee Chow Yong* correctly states the law on this point and have no hesitation in following it.

Reverting to this appeal, the respondents have not been able to show that they were in a position to issue execution on their judgment when they issued the present bankruptcy notice. It was therefore issued irregularly. Learned counsel for the respondents submits that a bankruptcy notice issued in such circumstances is not void but voidable and that I should not set aside the present bankruptcy notice as was the course taken in the case of *In Re Mohd. Fadzimi Yaakub Ex. P. United Malayan Banking Corporation Bhd.* [1998] 1 CLJ 783.

A reading of *In Re Fadzimi* shows that Selventhiranathan J, decided that failure to obtain leave to execute a judgment rendered the bankruptcy notice founded thereon voidable only and not void. The learned judge decided against setting aside the bankruptcy notice because he found on the facts of that case unmeritorious conduct on the judgment debtor's part in waiting for some two years before coming to court by which time limitation on the judgment had almost set in thus preventing the judgment creditor from proceeding afresh. I

cannot find similar conduct on the part of the appellants here. They have challenged the present bankruptcy notice upon being served with it. And they had also challenged the first bankruptcy notice which was set aside.

Section 131 of the Bankruptcy Act reads:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

The irregularity in this case has resulted in the present bankruptcy notice being issued and served on the appellants when it should not have been issued in the first place. The legal consequence of such service on the appellants is that if they do not within seven days respond in the manner indicated in the bankruptcy notice, they will have committed an act of bankruptcy. That act of bankruptcy becomes available not only to the respondents but to any other creditor of the appellants to present a bankruptcy petition on. I consider the sufferance of such an act as a matter of substantial injustice to the appellants which cannot be remedied by any order of court short of an order invalidating the bankruptcy notice by setting it aside which I now do. In accordance with r. 98, Bankruptcy Rules, I also declare that no act of bankruptcy has been committed by the appellants under the present bankruptcy notice. This appeal is accordingly allowed with costs. The decision of Deputy Registrar is set aside.